FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
The Home Depot
1520 New Brighton Blvd,
Minneapolis, MN 55413

As requested by DAVID J. STOLZBERG, Counsel for General Counsel
TYLER WIESE, Counsel for General Counsel

whose address is Federal Office Building, 212 Third Avenue South, Suite 200, Minneapolis, MN 55401-2657
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge
of the National Labor Relations Board

at via ZOOM/Video conference or in a manner and location otherwise ordered by the Regional Director and/or the Administrative Law Judge

in the City of Minneapolis, MN

on Monday, October 4, 2021 at 9:00 AM or any adjourned

or rescheduled date to testify in HOME DEPOT USA, INC. 18-CA-273796
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-1DL1GKT

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Minneapolis, MN

Dated: September 01, 2021

Lauren McFerran

Lauren McFerran, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Case 18-CA-273796

B-1-1DL1GKT

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

(Check method used.)

- ☐ by person
- ☐ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

_____

_____

_____

on the named person on

September 1, 2021

(Month, day, and year)

Carrie J. Klusman

(Name of person making service)

Secretary to the Officer in Charge

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

DEFINITIONS AND INSTRUCTIONS

a. "**Document"** means any existing printed, typewritten or otherwise recorded material of whatever character, records stored on computer or electronically, records kept on microfiche or written by hand or produced by hand and graphic material, including without limitation, checks, cancelled checks, computer hard drives, discs and/or files and all data contained therein, computer printouts, E-mail communications and records, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, licenses, files, letters, facsimile transmissions, memoranda, telegrams, minutes, notes, contracts, agreements, transcripts, diaries, appointment books, reports, records, payroll records, books, lists, logs, worksheets, ledgers, summaries of records of telephone conversations, summaries of records of personal conversations, interviews, meetings, accountants' or bookkeepers' work papers, records of meetings or conference reports, drafts, work papers, calendars, interoffice communications, financial statements, inventories, news reports, periodicals, press releases, graphs, charts, advertisements, statements, affidavits, photographs, negatives, slides, disks, reels, microfilm, audio or video tapes and any duplicate copies of any such material in the possession of, control of, or available to the subpoenaed party, or any agent, representative or other person acting in cooperation with, in concert with or on behalf of the subpoenaed party.

b. "Respondent" means HOME DEPOT USA, INC., including its officers, supervisors, managers and agents.

c. "The New Brighton Facility" means Respondent's facility located in New Brighton, Minnesota.

d. The "Respondent's facilities" means Respondent's facilities located in the United States of America.

e. "Person" or "persons" means natural persons, corporations, limited liability companies, partnerships, sole proprietorships, associations, organizations, trusts, joint ventures, groups of natural persons or other organizations, or any other kind of entity.

f. "Period covered by this subpoena" means the period from January 1, 2020, through the return date of this subpoena, and the subpoena seeks only documents from that period unless another period is specified. This subpoena request is continuing in character and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.

g. Any copies of documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered original documents and must be produced separately from the originals.

h. If any document covered by this subpoena contains codes or classifications, all documents explaining or defining the codes or classifications used in the document must also be produced.

i. Electronically Stored Information (ESI) should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. Execution of this subpoena requires a reasonable search of the ESI of all individuals ("custodians") who are most likely to possess information covered by the subpoena.

j. For all searches of ESI, records should be maintained documenting each "custodian" whose ESI was searched and all hardware and software systems searched. Records should also include who was responsible for the search and the search methodology used including, but not limited to, search terms and software tools.

k. All documents produced pursuant to this subpoena should be presented as they are kept in the usual course of business.

l. This subpoena applies to documents in your possession, custody, or control.

m. If any document responsive to any request herein was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control, and identify (stating the person's name, employer title, business address, home address, and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

n. If any document, including E-mails, responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating its date, author, subject, recipients and intended recipients), explain the circumstances surrounding the destruction, discarding, or disposal of the documents, including the timing of the destruction, discharging or disposal of the document, and identify all persons known or believed to have the document or a copy thereof in their possession, custody or control.

o. This subpoena excludes any documents that may be attorney work-product and/or protected by attorney-client privilege. The subpoena also excludes medical records and is not intended to include other documents protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

p. If a claim of privilege is made as to any document which is the subject of this subpoena, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.

q. Unless otherwise stated, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

r. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

s. To the extent Respondent has already provided responsive documents to a certain subpoenaed item during the underlying investigation, please respond with the date of

Respondent's submission to the Region that included the responsive documents and a brief description of those documents.

t. All documents produced pursuant to this subpoena should be organized by the paragraph number and subparagraph letter to which the documents are responsive. Labels referring to the subpoena paragraph (and subparagraph) are to be affixed to each document or set of documents. The documents should also be arranged chronologically within each separate packet and should not be commingled with documents that are responsive to other paragraphs.

DOCUMENTS TO BE PRODUCED

1. Documents reflecting all iterations of Respondent's dress code and/or apron policies.

2. Documents, including, but not limited to discipline(s) and counseling(s), as would show the Respondent's application of its dress code and/or apron policies related to "BLM" and/or "Black Lives Matter."

3. Documents, including, but not limited to, discipline(s) and counseling(s), associated with dress code and/or apron policies from Respondent's facilities included in (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (known to Counsel for General Counsel as District 103).

4. Documents reflecting discussions and/or directives regarding "BLM" and/or "Black Lives Matter" related to Respondent's dress code and/or apron policies from January 1, 2019, to present.

5. Documents reflecting guidance and/or application of Respondent's dress code and/or apron policies, practices, and/or the tolerance of the display of "BLM" and/or "Black Lives Matter."

6. The personnel file of (b) (6), (b) (7)(C)

7. Communications referencing (b) (6), (b) (7)(C) and: race, racial harassment, harassment, "BLM" and/or "Black Lives Matter."

8. Documents related to complaints and investigations of racial harassment allegations made at the New Brighton Facility from August 1, 2020, to present.

9. The personnel file of Respondent employee (b) (6), (b) (7)(C)

10. Documents, including, but not limited to, contemporaneous and/or after-the-fact recordings, notes, and emails, created by (b) (6), (b) (7)(C) from meetings held with (b) (6), (b) (7)(C) in an office at the New Brighton Facility during or around December 2020 and/or January 2021.

11. Documents, including, but not limited to, contemporaneous and/or after-the-fact recordings, notes, and emails, created by (b) (6), (b) (7)(C) and/or (b) (6), (b) (7)(C) from meetings held with (b) (6), (b) (7)(C) in an office at the New Brighton Facility on about February 14, 2021.

12. Documents, including, but not limited to, contemporaneous and/or after-the-fact recordings, notes, and emails, recorded by (b) (6), (b) (7)(C) and/or (b) (6), (b) (7)(C) from

meetings held with (b) (6), (b) (7)(C) in an office at the New Brighton Facility on about February 15, 2021.

13. Documents, including emails and other communications related to text messages, emails, and/or conversations between (b) (6), (b) (7)(C) and Respondent's agents, managers, and/or supervisors, referencing racial harassment, harassment, "BLM," "Black Lives Matter," and/or Black History Month.

14. Copies of all notes, photographs, or videos taken or made by any supervisor or agent of Respondent concerning any discussions, meetings, or other protected concerted activities, including, but not limited to, discussions of racial harassment, of Respondent's flooring department employees at the New Brighton Facility during the period from August 1, 2020, to present.

15. Communications, including, but not limited to, posters, emails, and/or memoranda, displayed, issued, and/or presented to associates by Respondent, which referenced, were in support of, and/or coincided with Respondent's acknowledgement and/or celebration of Black History Month and/or racial equality.

16. Communications issued by/or on behalf of Respondent's chief executive officer, human resources department, Regional managers, and/or District managers, concerning, reflecting, and/or defining, Respondent's corporate philosophy as it applies to race and/or racial harassment in the workplace.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

HOME DEPOT USA, INC., Respondent, v. (b) (6), (b) (7)(C), An Individual.	NLRB Cases 18-CA-273796

HOME DEPOT U.S.A., INC.'S
PETITION TO REVOKE SUBPOENA DUCES TECUM

Pursuant to Section 102.31(b) of the National Labor Relations Board's Rules and Regulations, Home Depot U.S.A., Inc., ("Home Depot") petitions the Regional Director of Region 18 of the NLRB to revoke the subpoena *duces tecum* B-1-1DL1GKT (the "subpoena"), issued on September 1, 2021 by NLRB Counsels for the General Counsel David J. Stolzberg and Tyler Wiese, and served upon Home Depot that same day.

INTRODUCTION

The Board's subpoena should be revoked for three reasons. First—and most fundamentally—this case is an unlawful attempt to control Home Depot's speech in violation of the First Amendment. The stated purpose of the General Counsel's Complaint is to force Home Depot to communicate certain specific messages on the Home Depot-owned aprons worn by Home Depot employees when interacting with customers on behalf of Home Depot on Home Depot property, even though Home Depot has made a deliberate choice *not* to communicate those messages in that particular forum. Compelling that speech plainly violates the First Amendment. The subpoena should be revoked because it was issued for the unlawful purpose of infringing

Home Depot's constitutional rights. Second, the subpoena is ultra vires because this proceeding is being brought by General Counsel who unlawfully took office before the expiration of her predecessor's statutory four-year term. Third, the subpoena is overbroad and unduly burdensome.

Home Depot is one of the Nation's most respected retailers. Home Depot abhors racial discrimination of any kind, and it strongly supports diversity, equity, and inclusion (DEI) in every aspect of its business. The Company is proud that in fiscal year 2020, underrepresented minorities comprised 53% of all new hires and 35% of those in management-level positions, and the Company was ranked in Omnikal's "Top 50 Organizations For Multicultural Business Opportunities." *The Home Depot ESG Report: Doing Our Part* 14, 17, 29, https://corporate.homedepot.com/sites/default/files/THD_2021ESGReport.pdf ("ESG Report"). Home Depot has also backed its commitment to DEI with financial resources, including by spending billions of dollars with diverse suppliers and establishing strategic partnerships with DEI-focused groups like the NAACP and 100 Black Men of America. *Id.* at 15, 98-100. Home Depot has also spoken out on important questions of race relations: Within days of George Floyd's murder in 2020, Home Depot CEO Craig Menear unequivocally condemned the "senseless killing" of Floyd and other unarmed Black men and women, reiterating the Company's commitment to "Racial Equality & Justice For All" and announcing a $1 million donation to the Lawyers Committee for Civil Rights Under Law.[1]

[1] Press Release, The Home Depot, Message From Craig Menear–Racial Equality & Justice for All (June 1, 2020), https://corporate.homedepot.com/newsroom/message-craig-menear-%E2%80%93-racial-equality-justice-all; Michael E. Kanell, *Home Depot Donates $1 Million, Citing George Floyd*, Atlanta J.-Const. (June 2, 2020), https://www.ajc.com/business/home-depot-donates-million-citing-george-floyd/EC2y0esjeZLD9GFnMFV6tK/

Home Depot is deeply committed to creating an open, inclusive, and welcoming environment for the diverse range of customers at its approximately 2,000 stores across the United States—regardless of race, gender, ethnicity, religion, sexual orientation, and political views. One way it advances this objective is by requiring that all customer-facing store employees (known as "associates") wear a common uniform—Home Depot's iconic orange apron—which reflects the company's brand and proudly declares the Company's eight core values, including "Respect for All People." Home Depot's Statement of Position at 2, No. 18-CA-273796, (NLRB Apr. 8, 2021) ("SOP").

Home Depot has adopted a policy indicating what messages can—and cannot—be displayed by store associates on their Home Depot-owned aprons. For example, Home Depot authorizes associates to display certain non-controversial messages, such as "[p]atriotic pins supporting the store's country of origin," "[p]ins with pictures of an associate's family members," and approved decorations celebrating certain "holidays" and "special occasions." (Exhibit 1, at 2).

By contrast, Home Depot prohibits its associates from wearing potentially divisive patches and pins that violate Home Depot's "policies on discrimination or unlawful harassment," "promote or display religious beliefs," or display "causes or political messages unrelated to workplace matters." *Id.* Over the past year, Home Depot has enforced its policy against politically-themed attire by forbidding security guards to wear neckscarves declaring "Blue Lives Matter," prohibiting pro-Trump "Make America Great Again" messaging, and forbidding associates from wearing on their apron "BLM" messaging supporting the Black Lives Matter movement. Of course, none of these restrictions on what associates may display on their Home Depot-owned

aprons when meeting customers prevents them from advocating whatever political or social views they choose in other ways, or on their own time.

The General Counsel's purpose in this proceeding is to obtain an order from the Board declaring that Home Depot's carefully calibrated policy governing what messages can and cannot be displayed on associates' aprons violates the National Labor Relations Act (NLRA). Specifically, the General Counsel seeks an order forcing Home Depot to allow associates to display BLM messages on the Home Depot apron, despite Home Depot's decision not to allow such messages there. For reasons Home Depot will show at the scheduled hearing, the General Counsel is wrong about the NLRA: Nothing in that statute requires Home Depot to allow employees to indicate on their aprons Company support for any political or social cause unrelated to workplace matters, including BLM.

But even if the NLRA could somehow be stretched that far—which it cannot—the General Counsel's theory would directly violate Home Depot's rights under the First Amendment. The Supreme Court and Eighth Circuit have long made clear that corporations, like individuals, are protected by the First Amendment—and that those protections include the right *not* to be forced to communicate political or social messages against their will, either directly or by serving as a conduit for the speech of third parties. *See, e.g.*, *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That is precisely what the General Counsel is trying to do here.

The Administrative Law Judge should reject the General Counsel's unconstitutional overreach. Accordingly, we ask the Judge to revoke the subpoena because it rests on a constitutionally invalid charge and has been made for the unlawful purpose of violating Home

Depot's First Amendment rights. At the very minimum, the Judge should modify the subpoena because it is overbroad and unduly burdensome.

ARGUMENT

I. The Subpoena Should Be Revoked Because This Case Has Been Brought For The Unlawful Purpose Of Compelling Home Depot's Speech, In Violation Of The First Amendment

NLRB subpoenas are appropriate only when based on a legally valid theory of respondent misconduct and when issued pursuant to the Board's "lawful authority" and for a "lawful purpose." *NLRB v. Fortune Bay Resort Casino,* 688 F.Supp.2d 858, 862-63 (D.Minn. 2010). As the Supreme Court has made clear, whether an administrative subpoena rests on a "valid" charge of misconduct turns on whether the charge is "legally sufficient." *McLane Co., Inc. v. E.E.O.C.*, 137 S.Ct. 1159, 1168 n.3 (2017); *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485–86 (7th Cir. 1987) (explaining subpoena is unenforceable if opposing party "can show that there is no factual or legal support for the agency's preliminary determination to investigate"). Under these standards, a Board subpoena issued for the purpose of advancing an unconstitutional theory of the NLRA must be rejected.

Here, the Complaint on its face invokes the NLRA to compel Home Depot to broadcast, on its Home Depot-owned and highly branded aprons, "Black Lives Matter" and/or "BLM" messages to its customers. In other words, the General Counsel is asking the Board to compel Home Depot to communicate specific speech on a topic of political and social concern (and to do so in a specific forum, the apron). That request plainly violates the First Amendment. The subpoena should accordingly be revoked.

The First Amendment flatly prohibits any law "abridging the freedom of speech." U.S. Const. amend. I. Inherent in that freedom is "the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988) (emphasis

in original). The First Amendment does not merely limit the government's power to restrain speech, but also "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006).

In application, that principle means two things. Most directly, the government cannot compel a speaker to alter the content of its own speech in favor of conveying the government's desired speech. *See Barnette*, 319 U.S. at 642. Indeed, "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995).

In addition, as a corollary, the government cannot force a speaker to serve as an unwilling conduit of a third party's message, especially in circumstances where the message would likely be perceived as coming from the speaker (and not just the third party). Thus, for example, the Supreme Court has held that a state may not force drivers to be a "mobile billboard" for the state's message by mandating a license plate bearing a sentiment the driver chooses not to communicate. *See Maynard*, 430 U.S. at 717. Nor may a state force parade organizers to allow a group to march in the parade, when the organizers do not wish to include that group's message in their own forum. *See Hurley*, 515 U.S. at 566, 575-76. Nor can a state mandate that a company disseminate a third party's opposing speech in the company's regular mailings, *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality op.), or require that a newspaper publish the replies of any political candidates the newspaper may criticize, *Tornillo*, 418 U.S. at 258.

Like any other speaker, Home Depot has a First Amendment right to control the content of its speech. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751–52 (8th Cir. 2019) (noting that compelled speech principles protect corporate speakers as well as individuals); *see also Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (collecting cases). As an exercise of its free

speech rights, Home Depot has chosen to communicate with its customers through one of its most recognizable and iconic symbols—the orange apron worn by sales associates.

Home Depot carefully calibrates the substance of that communication. The apron itself affirmatively declares the Company's eight core values in the "value wheel" printed over the heart. SOP 2-3. Home Depot has also authorized associates to wear certain types of patches or pins on their aprons—namely, those reflecting patriotism, love of family members, and support for certain Home Depot-approved holidays and special events. (Exhibit 1, at 2). But it has forbidden the display of some messages that Home Depot affirmatively disapproves—such as those violating "Company . . . policies on discrimination or harassment." It has also forbidden statements that might be divisive or controversial among customers or associates—including statements involving profanity, religion, or "causes or political messages unrelated to workplace matters." *Id.* Home Depot's decisions about what messages it *does* and *does not* want to communicate are classic First Amendment-protected activity.

The General Counsel's theory of this case is that the NLRA requires Home Depot to authorize its associates to display the markings "Black Lives Matter" or "BLM" on its orange aprons, even though such messages plainly violate Home Depot's decision not to communicate "causes or political messages unrelated to workplace matters." Compl. 4. That theory is wrong on its own terms—the NLRA contains no such requirement.[2] More importantly for present

[2] As Home Depot will establish at the scheduled hearing, such messages do not constitute protected concerted activity under Section 7 of the NLRA, and Home Depot's restrictions are in any event protected by the "special circumstances" doctrine. But even if the NLRA could theoretically bear the General Counsel's interpretation, settled principles of constitutional avoidance would weigh strongly against that interpretation in light of the obvious First Amendment problems discussed above. *See NLRB v. Ford Motor Co.*, 114 F.2d 905, 914 (6th Cir. 1940) ("Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment."); *see generally Edward J. DeBartolo*

purposes, the General Counsel's interpretation of the NLRA directly violates Home Depot's First Amendment rights, for at least two reasons.

First, the General Counsel's interpretation is unconstitutional because it seeks to force Home Depot to communicate a message about the BLM movement, even though Home Depot has expressly decided *not* to convey on its aprons *any* "causes or political messages unrelated to workplace matters." As explained, Home Depot uses its aprons to convey the Company's core values to its customers—much like businesses regularly use billboards, advertising, and other signage. Home Depot wants the aprons to project a message of hospitality, inclusivity, and respect to all, while avoiding messages that may be polarizing to customers or associates in Home Depot's stores. The Complaint improperly seeks to tell Home Depot "what [it] must say." *FAIR*, 547 U.S. at 61. Just like the plaintiffs in *Wooley v. Maynard*—who were forced to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty"—Home Depot would be forced to use its most recognizable symbol, worn by its most public-facing employees, to display a BLM message under threat of legal sanction. 430 U.S. at 715. That outcome is not compatible with the First Amendment.

Alternatively, the General Counsel's theory of the NLRA would be unconstitutional even if a BLM message on an apron were (incorrectly) deemed to reflect only the *employee's* speech, and not Home Depot's. In that circumstance, the General Counsel would be requiring Home Depot to serve as an unwilling conduit of that speech. That too would violate the First Amendment. The Supreme Court's "compelled-speech cases are not limited to the situation in which an individual

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Corp. v. Fla. Gulf Coast Blg. & Const. Trades Council, 485 U.S. 568, (1988) (holding that courts must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it").

must personally speak the government's message." *FAIR*, 547 U.S. at 63. Indeed, the Court has also "limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.* (citing *Hurley*, *Pacific Gas*, and *Tornillo*); *see also Telescope Media Grp.*, 936 F.3d at 751–52 ("The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker.").

Here, at the very minimum, the General Counsel's expansive interpretation of the NLRA would require Home Depot to serve as the conduit for the speech of its employees, by allowing those employees to disseminate their personal views about BLM on Home Depot-owned aprons, to Home Depot customers, while the employees are on the job representing Home Depot. Just as in *Pacific Gas*—where the state required a private utility to include a third party's newsletter criticizing the company in the company's billing envelope—the General Counsel's theory here "identifies a favored speaker 'based on the identity of the interests that [the favored speaker] may represent' and forces [another] to assist in disseminating the speaker's message." 475 U.S. at 15 (plurality op.) (citation omitted). And just like in *Hurley*—where the Court recognized that forcing parade organizers to include in the parade a group conveying an inconsistent message "would likely be perceived" as resulting from the organizers' endorsement of that message—forcing Home Depot to authorize associates to display BLM messages on Home Depot's aprons would inevitably lead its customers to assume that they are speaking with Home Depot's approval and on Home Depot's behalf. 515 U.S. at 757-76. None of this is constitutional.

In short, the General Counsel's theory of this case embraces a flawed interpretation of the NLRA that is directly at odds with the First Amendment. The General Counsel's subpoena should be revoked because it rests on a "legally [in]sufficient" and "[in]valid" charge and is presented for an "unlawful purpose." *McLane*, 137 S.Ct. 1159, 1168 n.3; *Fortune Bay Resort Casino*, 688

F.Supp.2d at 862-63. Home Depot should not have to respond to the Board's subpoena in a case that so plainly violates the Constitution.

II. The Complaint And Subpoena Are Ultra Vires Because They Are Proceeding Under The Authority Of An Improperly Appointed General Counsel

The subpoena should also be revoked because this proceeding—including the subpoena request itself—was initiated by an improperly appointed General Counsel, before the expiration of her predecessor's full four-year term.

The Board is an independent agency designed by Congress to be insulated from pressure by the political branches. To that end, the General Counsel is nominated by the President and confirmed by the Senate for a fixed four-year term. 29 U.S.C. §153(d). The Supreme Court has long recognized that principal officers serving fixed terms at independent agencies are removable only for-cause. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). And the Supreme Court has twice in recent years reaffirmed the vitality of that bedrock rule. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2198-99 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). Nonetheless, on January 20, 2021, President Biden purported to dismiss Peter Robb as General Counsel of the NLRB, approximately ten months before his statutory term was due to expire on November 16, 2021. President Biden subsequently designated Peter Sung Ohr as Acting General Counsel, and nominated Jennifer Abruzzo to permanently succeed Robb. Neither action was lawful, because General Counsel Robb's statutory four-year term had not yet expired. As a result, both the Complaint and the subpoena in this case are unlawful and ultra vires. The Complaint was filed under the authority of Mr. Ohr, and the subpoena was requested under the authority of Ms. Abruzzo, even though Mr. Robb had a statutory right to continue serving as General Counsel at the relevant time.

Home Depot acknowledges that the Board has declined to adjudicate this issue. *See Nat'l Ass'n of Broadcast Emps. & Techs.*, 370 NLRB No. 114, at *2 (Apr. 30, 2021) ("It is for the courts, not the Board, to make the initial and final determinations on the [appointment and removal] issues presented here."). Nonetheless, Home Depot asserts this argument here to preserve it, as needed, for judicial review at an appropriate stage in this case.

III. The Subpoena Is Overbroad And Unduly Burdensome

Home Depot objects to the geographic scope of the subpoena insofar as it seeks documents pertaining to facilities other than its facility located in New Brighton, Minnesota (the "New Brighton facility").

Home Depot further specifically objects to subpoena Paragraphs:

- 1 because this Paragraph is overly broad and unduly burdensome;
- 2 and 5 because these Paragraphs are overly broad in their universal nature, unduly burdensome, and the ESI requested is also unduly burdensome;
- 3 because this Paragraph is overly broad and unduly burdensome;
- 4 because this Paragraph is overly broad, unduly burdensome, and seeks irrelevant evidence;
- 7 because this Paragraph seeks irrelevant evidence and is unduly burdensome;
- 8 because it is overly broad and seeks irrelevant evidence;
- 9 because this Paragraph seeks irrelevant evidence;
- 13 because it is overly broad;
- 14 because it is overly broad and seeks irrelevant evidence;
- 15 because it is overly broad and unduly burdensome; and
- 16 because it is overbroad, voluminous, burdensome, and seeks irrelevant evidence.

a. Home Depot objects to the geographic scope of this subpoena as a whole, and particularly objects to the scope of Paragraphs 1-5, 13, 15, and 16.

Requests for documents from "Respondent's facilities located in the United States of America" are overly broad and unduly burdensome. First, one individual, (b) (6), (b) (7)(C) ("(b) (6), (b) (7)(C) brought this charge. The Complaint in this matter makes clear it relates to the policies as Home Depot applied them to (b) (6), (b) (7)(C) at the New Brighton facility, and (b) (6), (b) (7)(C) only. The

Complaint further alleges that the policy in question was "unlawfully-applied," not that the policy, as a whole, is unlawful, which it is not. *See AT&T Mobility, LLC and Marcus Davis*, 370 NLRB No. 121 (2021).

In *AT&T*, the Board drew the distinction between the lawfulness of the policy *as a whole*, under *Boeing*, and the lawfulness of the policy as *applied*. *See Boeing Co.*, 365 NLRB No. 154 (2017). The Board overruled the "applied to restrict" standard in *Lutheran Heritage*, finding that a wrongful application of workplace rule does not automatically condemn the rule unlawful to be maintained. *Id.* at *7; *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board noted that this standard:

> [I]gnores the legitimate and often compelling interests an employer has in being able to continue to maintain a lawful rule. Depending upon the rule at issue, those interests may include maintaining production, securing the employer's premises, preventing workplace harassment, promoting workplace civility and protecting employees from rumor-mongering and bullying, and protecting the employer's reputation and business from improper threats.

Id. at *7. The Board found a "rule may remain lawful to maintain notwithstanding that its application restricted the exercise of Section 7 rights" and the remedy for the "applied to restrict" standard was "largely meaningless." *Id.* at *9.

The allegation here requires assessment of the policy *as applied* to (b) (6), (b) (7)(C) not whether the policy, is lawful *on its face*. Under *AT&T*, due to the "as applied" nature of its allegations, the General Counsel simply cannot obtain the nationwide remedy it seeks here, and thus documents purporting to relate to that remedy are irrelevant. Moreover, ordering Home Depot to produce documents from all facilities in the United States would impose substantial and unnecessary costs, because Home Depot maintains approximately 2,000 stores. No amount of documents from stores, other than New Brighton, will shed further light on the Complaint's allegations. Further, Home Depot does not dispute the applicability of its dress code and apron policies nationwide, so

documents regarding other locations are unnecessary to establish nationwide applicability. The burdens imposed by a nationwide subpoena scope far exceed the evidentiary value to the General Counsel.

In the alternative, if documents from any facility other than those at New Brighton are required, Home Depot should be required to produced only documents within the District (a geographic administrative grouping of stores by Home Depot) in which New Brighton sits. This District includes eleven (11) stores. The subpoena itself notes the District level at Paragraph 3, in reference to interactions between District-level representatives and (b) (6), (b) (7)(C) To the extent the General Counsel asserts a vague need to assess application of Home Depot's policies at other stores, documents from ten (10) other stores would more than suffice to satisfy any evidentiary needs.

Second, the definition of "facilities" is overly broad and vague. Home Depot has thousands of "facilities" in the United States. "Facilities" could encompass stores, distribution centers, supply chain hubs, administrative offices, regional offices, etc. The General Counsel did not define this term narrowly enough to make clear which types of "facilities" it seeks to include. If the General Counsel does intend for the subpoena to encompass all types of "facilities," then the requests are overly broad, and would require Home Depot to expend outrageous costs to comply. Additionally, such a request would go far beyond the scope of relevance to the Complaint's allegations.

b. Home Depot objects to subpoena Paragraph 1 because it is overly broad and unduly burdensome.

Paragraph 1 of the subpoena seeks:

> Documents reflecting all iterations of Respondent's dress code and/or apron policies.

The evidence sought in Paragraph 1 does not specify the meaning of "all iterations." "All iterations" of the requested policies could implicate thousands of irrelevant documents that just happen to mention Home Depot's policies. Such a search would impose an overly burdensome and unnecessarily costly endeavor.

Further, this Request does not provide a narrowly tailored time limitation. To the extent the General Counsel defines the "period covered by this subpoena" in the definitions section, it fails to limit the scope of the subpoena to the time frame when (b) (6), (b) (7)(C) was employed. (b) (6), (b) (7)(C) was hired in (b) (6), (b) (7)(C), and the subpoena requests documents beginning in January 1, 2020. Additionally, the subpoena's time period runs to the present time, thus incorporating time periods subsequent to (b) (6), (b) (7)(C) 2021 resignation. Any scope exceeding (b) (6), (b) (7)(C) tenure is unnecessary, and any documents outside that scope are irrelevant.

Home Depot's objections to these Paragraphs also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked for seeking overly broad and unduly burdensome evidence.

c. Home Depot objects to subpoena Paragraphs 2 and 5 because they are overly broad in their universal nature, unduly burdensome, and the ESI requested is equally burdensome.

Paragraphs 2 and 5 of the subpoena seek:

> Paragraph 2: Documents, including, but not limited to discipline(s) and counseling(s), as would show the Respondent's application of its dress code and/or apron policies related to "BLM" and/or "Black Lives Matter."
>
> Paragraph 5: Documents reflecting guidance and/or application of Respondent's dress code and/or apron policies, practices, and/or the tolerance of the display of "BLM" and/or "Black Lives Matter."

The evidence sought in Paragraphs 2 and 5 are overly broad and unduly burdensome, particularly because these requests would require an extensive and costly search of ESI. "Documents," as defined in the definitions section, include "E-mail communications and records." Due to the unrestricted geographic search, it would take a substantial amount of time, money, and fees to review every single e-mail that runs through Home Depot's system, which includes any mention of the dress code, as well as the topic of Black Lives Matter. Particularly, the "tolerance of the display" phrase used in Paragraph 5 is undefined, and could potentially encompass any conversation had amongst Home Depot's employees about such topics, the vast majority of which are unrelated to the allegations at hand. These Requests are thus far too broad.

Additionally, this Request is unduly burdensome due to the lack of proper time limitation. As noted above, (b) (6), (b) (7)(C) was hired in (b) (6), (b) (7)(C) and resigned in (b) (6), (b) (7)(C) 2021. The Definitions section of the subpoena asks Home Depot to expand its search to include January 1, 2020, continuing to present. However, documents from outside (b) (6), tenure are irrelevant, and their retrieval would unduly burden Home Depot.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked for seeking overly broad and unduly burdensome evidence.

d. Home Depot objects to subpoena Paragraph 3 because it is overly broad, overreaching in its scope, and unduly burdensome.

Paragraph 3 of the subpoena seeks:

> Documents, including, but not limited to, discipline(s) and counseling(s), associated with dress code and/or apron policies from Respondent's facilities included in (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (known to Counsel for General Counsel as District 103).

The evidence sought in Paragraph 3 is overly broad and unduly burdensome, particularly because this will require an extensive and costly search of ESI. This Request asks for "documents, including but not limited to, discipline(s) and counseling(s)." The "including but not limited to" language expands this search for "documents" far beyond relevant evidence. While more limited than the other nationwide requests contained in this subpoena, Home Depot would still be required to expend a substantial amount of time, money, and fees to review the documents implicated by this request which are not relevant to any issue in dispute.

Further, this Request is unduly burdensome due to the lack of proper time limitation. (b) (6), (b) (7)(C) was hired in (b) (6), (b) (7)(C). The Definitions section of the subpoena asks Home Depot to expand its search to January 1, 2020. However, documents held prior to (b) (6), (b) (7)(C) hiring in (b) (6), (b) (7)(C) 2020 are irrelevant, and to retrieve them would be unduly burdensome to Home Depot.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked because it is far too broad, burdensome, and has a minimal potential of returning relevant evidence.

e. Home Depot objects to subpoena Paragraph 4 because it is overly broad in its universal nature, unduly burdensome, and seeks irrelevant evidence.

Paragraph 4 of the subpoena seeks:

> Documents reflecting discussions and/or directives regarding "BLM" and/or "Black Lives Matter" related to Respondent's dress code and/or apron policies from January 1, 2019, to present.

The evidence sought in Paragraph 4 is overly broad and unduly burdensome due to its time period exceeding that of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) - (b) (6), (b) (7)(C) 2021 tenure. As explained above,

documents from times when (b) (6), (b) (7)(C) did not work for Home Depot are irrelevant to the Complaint's allegations.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked because it is unduly burdensome, overly broad, and seeks irrelevant evidence.

f. Home Depot objects to subpoena Paragraph 7 because it seeks irrelevant evidence and is unduly burdensome.

Paragraph 7 of the subpoena seeks:

> Communications referencing (b) (6), (b) (7)(C) and: race, racial harassment, harassment, "BLM" and/or "Black Lives Matter."

The evidence sought in Paragraph 4 is overly broad and unduly burdensome due to its time period exceeding that of (b) (6), (b) (7)(C) - (b) (6), (b) (7)(C) 2021 tenure. As explained above, documents from times when (b) (6), (b) (7)(C) did not work for Home Depot are irrelevant to the Complaint's allegations.

This Paragraph should thus be revoked for seeking irrelevant and unduly burdensome documents.

g. Home Depot objects to subpoena Paragraph 8 because it is overly broad and seeks irrelevant evidence.

Paragraph 8 of the subpoena seeks:

> Documents related to complaints and investigations of racial harassment allegations made at the New Brighton Facility from August 1, 2020, to present.

The evidence sought in Paragraph 8 is irrelevant and overly broad as to time, specifically Requests for the documents from '(b) (6), (b) (7)(C) to present." As noted above, (b) (6), (b) (7)(C) resigned

in (b) (6), (b) (7)(C) of 2021. Home Depot's documents following (b) (6), (b) (7)(C) resignation are irrelevant and would place an unnecessary burden on Home Depot.

Additionally, this Request is irrelevant in the entirety. The General Counsel alleges Home Depot's policy was not applied properly against (b) (6), (b) (7)(C) Documents relating to "complaints and investigations of racial harassment" regarding any situation other than (b) (6), (b) (7)(C) are not at issue. Home Depot would have to expend unnecessary costs to retrieve documents unrelated to (b) (6), (b) (7)(C) allegations.

This Paragraph should thus be revoked for seeking overly broad and irrelevant evidence.

h. Home Depot objects to subpoena Paragraph 9 because it seeks irrelevant evidence.

Paragraph 9 of the subpoena seeks:

The personnel file of Home Depot employee (b) (6), (b) (7)(C)

The documents sought in Paragraph 9 are overly broad. Specifically, Home Depot respectfully requests that the Paragraph be limited to (b) (6), (b) (7)(C) disciplinary history, because only such disciplinary documents could hold relevance to the Complaint's allegations. The General Counsel cannot demonstrate any need for documents in (b) (6), (b) (7)(C) file which may reflect biographical information of (b) (6), (b) (7)(C), and routine non-disciplinary employment documentation. As a result, Paragraph 9 should be narrowed to include only disciplinary documentation.

i. Home Depot objects to subpoena Paragraph 13 because it is overly broad.

Paragraph 13 of the subpoena seeks:

> Documents, including emails and other communications related to text messages, emails, and/or conversations between (b) (6), (b) (7)(C) and Respondent's agents, managers, and/or supervisors, referencing racial harassment, harassment, "BLM," "Black Lives Matter," and/or Black History Month.

The evidence sought in Paragraph 13 is overly broad as to time, insofar as it exceeds the time period of (b) (6), (b) (7)(C) tenure, as outlined above.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked due to its overbreadth.

j. Home Depot objects to subpoena Paragraph 14 because it is overly broad and seeks irrelevant evidence.

Paragraph 14 of the subpoena seeks:

> Copies of all notes, photographs, or videos taken or made by any supervisor or agent of Respondent concerning any discussions, meetings, or other protected concerted activities, including, but not limited to, discussions of racial harassment, of Respondent's flooring department employees at the New Brighton Facility during the period from August 1, 2020, to present.

The evidence sought in Paragraph 14 is overly broad as to time, insofar as it exceeds the time period of (b) (6), (b) (7)(C) tenure, as outlined above.

Additionally, this Request is overly broad and irrelevant as it relates to "other protected concerted activities." While the Complaint refers to racial harassment claims, the subpoena also seeks documents relating to "other protected concerted activities." Such a scope encompasses each and every complaint about a working condition that touches on group concerns at the Facility. This Request thus goes far beyond the scope of the issues and policy described in the Complaint here, and instead includes the classic hallmarks of a "fishing expedition."

This Paragraph should thus be revoked for seeking overly broad and irrelevant documents.

k. Home Depot objects to subpoena Paragraph 15 because it is overly broad and unduly burdensome.

Paragraph 15 of the subpoena seeks:

> Communications, including, but not limited to, posters, emails, and/or memoranda, displayed, issued, and/or presented to associates by Respondent, which referenced, were in support of, and/or coincided with Respondent's acknowledgement and/or celebration of Black History Month and/or racial equality.

The evidence sought in Paragraph 15 is overly broad as to time, insofar as it exceeds the time period of (b) (6), (b) (7)(C) tenure, as outlined above.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked for seeking overly broad and unduly burdensome evidence.

l. Home Depot objects to subpoena Paragraph 16 because it is substantially overbroad, voluminous, burdensome, and seeks irrelevant evidence.

Paragraph 16 of the subpoena seeks:

> Communications issued by/or on behalf of Respondent's chief executive officer, human resources department, Regional managers, and/or District managers, concerning, reflecting, and/or defining, Respondent's corporate philosophy as it applies to race and/or racial harassment in the workplace.

The evidence sought in Paragraph 16 is overly broad, potentially voluminous, burdensome, and irrelevant. The Complaint here relates to the apron and dress code policies as applied to (b) (6), (b) (7)(C) The Complaint does not challenge the legality of these policies on their face. It particularly does not relate to the ways in which the "chief executive officer, human resources department, regional managers, and/or district managers" of every store in the United States apply the policy to employees at any given store at any time. Additionally, it would be burdensome to the point of near impossibility to obtain all "communications issued" by these individuals, as "communications" could encompass any conversation, text message, email, etc. The inclusion of the "chief executive officer" in this Paragraph highlights the vast overbreadth and irrelevance of

this Request, as the General Counsel cannot allege that such high-level corporate executives had any involvement in (b) (6), (b) (7)(C) employment, nor the events immediately prior to (b) (6), resignation. Furthermore, such overbreadth would require overly voluminous document production and expenditure of significant man hours, fees, and other costs, all to produce minimally relevant documents.

Home Depot's objections to this Paragraph also include the geographic scope objections described in Paragraph I, *supra*.

This Paragraph should thus be revoked because it requests substantially overbroad, voluminous, burdensome, and seeks irrelevant evidence.

CONCLUSION

For all of these reasons, Home Depot respectfully requests that subpoena *duces tecum* B-1-1DL1GKT be revoked or modified.

Respectfully submitted,

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Dated: September 9, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2021 I filed the PETITION TO REVOKE SUBPOENA DUCES TECUM via the National Labor Relations Board's E-File system, and served the same to the following parties via electronic mail:

(b) (6), (b) (7)(C) Charging Party
(b) (6), (b) (7)(C)

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Counsel for the General Counsel

/s/ C. Thomas Davis
C. Thomas Davis

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

HOME DEPOT U.S.A., INC
(Respondent)

and **Case 18-CA-273796**

(b) (6), (b) (7)(C)
(An Individual)

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S PETITION TO REVOKE SUBPOENA DUCES TECUM

Pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel ("Counsel") opposes the Petition to Revoke Subpoena Duces Tecum ("Petition") for subpoena B-1-1DL1GKT ("Subpoena") filed by Home Depot U.S.A., Inc. ("Respondent") on September 9, 2021.

Summary of Arguments

Counsel's case rests on well-founded legal principles regarding the Board's authority to regulate unlawful employer conduct and a rational extension of Board law regarding the scope of protected concerted activities under Section 7 of the Act. The Subpoena is narrowly tailored to ensure that Counsel receives relevant documents to prove their case while minimizing the impact and cost to Respondent's operations. Counsel is also involved in a good-faith effort to address, where possible, Respondent's stated concerns regarding scope, burdensomeness, and ambiguity. These efforts, which are continuing, have thus far been unsuccessful, necessitating the present Opposition.

In substance, Respondent's Petition ignores well-settled law regarding the Board's ability to regulate employer speech, raises unfounded arguments regarding the appointment of the current General Counsel, and does not otherwise satisfy the high bar for denying production of relevant information. This Opposition will briefly address each of these issues in turn. First, we will demonstrate that, contrary to Respondent's overheated rhetoric, Counsel's subpoena does not raise any constitutional issues. Next, we will address the appointment issue and why it does not serve as grounds to quash the subpoena. Finally, we will address Respondent's specific arguments, including geographic scope among other objections.

I. Respondent's First Amendment Arguments Ignore the Particular Context of Labor Relations and Decades of Supreme Court and Board Precedent

Respondent's arguments regarding employer free speech rights are neither new nor novel. Shortly after passage of the Act, Congress recognized the need to strike a balance between the Board's ability to regulate speech and the strictures of the First Amendment, and codified this balance by adding Section 8(c) to the National Labor Relations Act as part of the Taft-Hartley Amendment:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

After this passage was added, the Supreme Court explained, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the proper interplay between these competing interests:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended

> implications of the latter that might be more readily dismissed by a more disinterested ear.

Thus, Respondent's purported concerns about the impact on its First Amendment rights have long been recognized, and the principles applicable to such concerns are well-established in the context of the Act.

Consistent with this guidance provided by the Supreme Court, the Board has regularly regulated an employer's ability to restrict employee expression. To cite a recent example, in *American Medical Response West,* 370 NLRB No. 58 (Dec. 10, 2020), an employer sought to prohibit ambulance drivers from wearing buttons opposing a workplace law called "Prop 11" on their employer-provided uniform. The Board found that, despite the employer's claim of "special circumstances" related to patient safety and public image, the restriction was unlawful.[1] Similarly, in *In-N-Out Burger, Inc.,* 365 NLRB No. 39 (Mar. 21, 2017), an employer sought to restrict employees from wearing "Fight for Fifteen" buttons (supporting wage increases) on their workplace uniform; the Board found this restriction unlawful, again finding that the employer had not established a sufficient defense to block these protected activities.[2] These are just two examples of the scores of instances where the Board has regulated an employer's ability to restrict what employees wear while at the workplace, when such apparel connects to Section 7 activity. Indeed, such a right has been supported by the Supreme Court since the earliest days of the Act.[3] Of course, such rights are not unlimited in the face of legitimate employer concerns.[4]

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1 370 NLRB No. 58*,* slip op. at *1.

2 365 NLRB No. 39, slip op. at *1 & n.2.

3 *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 802–03 (1945).

4 *E.g., W San Diego,* 348 NLRB 372, 375–76 (2006) (employer prohibition of union stickers on uniforms in kitchen permissible where stickers posed legitimate risk to food health

But the key is that there is no *blanket* constitutional prohibition on the Board limiting an employer's ability to regulate employee expression on their apparel.

None of Respondent's arguments seriously challenge or even address this caselaw. Rather, Respondent cites to First Amendment caselaw (Pet. 5–7) from various other, non-labor contexts, such as newspapers, parades, and billboards. This caselaw, however, does not address the "context of the labor relations setting," and in particular the "economic dependence" of employees that informs such a First Amendment inquiry. *Gissel Packing, supra.* Respondent's First Amendment arguments are, therefore, misplaced.

More fundamentally, Respondent's arguments go to the merits of an issue that can only be analyzed *after* the parties have presented their evidence and arguments in this case. Counsel possesses the broad authority to subpoena information "if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint."[5] The information sought here, as we explain below in Part 3, is relevant to supporting numerous allegations in the complaint. By attempting to categorically block Counsel's right to relevant evidence in support of its Amended Complaint, Respondent is impermissibly putting the cart before the horse.[6]

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and safety); *Pathmark Stores,* 342 NLRB 378, 379 (2004) (employer lawfully prohibited employees from wearing apparel that could be read by customer as attacking employer's products).

[5] ALJ BENCH BOOK § 8–310 "Material Must Be 'Reasonably Relevant'" (Mar. 2021), and authorities cited therein.

[6] *See* cases cited *infra* n.10.

II. Respondent's Appointment Arguments Are Not Relevant to Subpoenas in Administrative Proceedings Before the Board And, in Any Event, Are Incorrect as a Matter of Law

Aside from the remarkable assertion that it has a First Amendment right to gag its employees' exercise of their own statutory and constitutional freedom of speech, Home Depot also alleges that "this proceeding—including the subpoena request itself—was initiated by an improperly appointed General Counsel." Respondent claims that President Biden unlawfully removed former General Counsel Peter Robb, and that this removal renders any actions taken by the present General Counsel, or her immediate predecessor, invalid. As shown below, it is the Board, not the General Counsel, that issued the subpoena; at best, Respondent's assertion amounts to an improper argument about the merits of the prosecution, which is not before the Board in a subpoena proceeding; and, in any event, former General Counsel Robb was lawfully removed.

As an initial matter, it is the Board, not the General Counsel, that holds the ultimate authority to issue subpoenas.[7] Here, the subpoena was signed and issued by Chairman Lauren McFerran, whose appointment is of undisputed validity. In addition, as Administrative Law Judge Green observed in denying a similar petition to revoke, "Regional Directors, not the General Counsel, are designated as the agents responsible for issuing subpoenas before a hearing

[7] 29 U.S.C. § 161(1); 29 C.F.R. § 102.31(a).

opens."[8] Because "[t]he General Counsel plays no role in this process," the subpoena is not subject to challenge based on the identity of the General Counsel.[9]

Respondent's objection to the subpoena is almost identical to its thirtieth affirmative defense (Answer to Complaint, 7 (Sept. 7, 2021)). But as numerous courts have held, merits defenses have no bearing on the validity or enforceability of a subpoena.[10] This rule is essential; parties cannot be permitted to turn every proceeding to enforce a subpoena into a miniature inquest into the merits of agency proceedings. To do so would unnecessarily disrupt and delay the adjudication of underlying disputes, grafting the actual merits of the matter onto an investigative offshoot.[11]

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[8] *Amazon.com Services LLC*, Case 29-CA-261755 (NLRB Div. of Judges Mar. 24, 2021) (citing 29 C.F.R. § 102.31(a)) (order on trial dates and the respondent's petition to partially revoke counsel for the Acting Counsel's subpoena duces tecum), https://apps.nlrb.gov/link/document.aspx/09031d45833db988.

[9] *Id.*

[10] *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. Line,* 50 F.3d 311, 315 (5th Cir. 1995); *NLRB v. Wilson,* 335 F.2d 449, 451 (5th Cir.1964); *Link v. NLRB*, 330 F.2d 437, 440 (4th Cir. 1964); *NLRB v. C.C.C. Associates*, 306 F.2d 534, 538 (2d Cir. 1962); *see also EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 788 (7th Cir. 1983);*NLRB ex rel. Int'l Union of Elec., Radio & Mach. Workers v. Dutch Boy, Inc.*, 606 F.2d 929, 932–33 (10th Cir. 1979); *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

[11] *Endicott Johnson*, 317 U.S. at 508–09 (district court had no authority to hold its own trial of question of statutory coverage in subpoena enforcement proceeding, and it would be impractical to require agency to bifurcate its proceedings to resolve the coverage issue first); *Wilson*, 335 F.2d at 451 (court in subpoena enforcement case has no authority to determine disputed fact issues); *Hamilton v. NLRB*, 177 F.2d 676, 677 (9th Cir. 1949) (inappropriate for respondent to "demand that the pending inquiry be halted while piecemeal reviews are sought in the courts"); *Dutch Boy*, 606 F.2d at 933 ("piecemeal appeals will disrupt and delay resolution of labor disputes").

In any event, President Biden did not improperly remove former General Counsel Robb.[12]

In *Goonan v. Amerinox Processing, Inc.*, the United States District Court for the District of New Jersey recently held that "the President may relieve the General Counsel of his or her duties without the process required for Board members."[13] The court reasoned that the "plain language" of the Act compelled this conclusion after comparing the express protection from removal afforded Board Members under Section 3(a) with the absence of anything similar in Section 3(d).

The ruling in *Amerinox* is entirely consistent with the Supreme Court's recent decision in *Collins v. Yellen*, which swiftly dispenses with any argument that the General Counsel is not removable at the pleasure of the President.[14] In *Collins*, the Supreme Court held that statutory silence on the question of removability indicates Congressional intent to follow the default rule that officers serve at the pleasure of the person or body appointing them.[15] And Section 3(d) of the NLRA, which creates the position of General Counsel and provides it a four-year term, is silent on the question of removability. In contrast, Section 3(a) of the Act expressly provides

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12 *National Association of Broadcast Employees and Technicians (American Broadcasting Companies, Inc.)*, 370 NLRB No. 114, slip op. at 2 (2021), could be read to defer this issue to federal court resolution. For the reasons stated by the Counsel in her brief in support of cross-exceptions in *Amerinox Processing, Inc.*, No. 04-CA-268380 et al., the Board should revisit its determination in *NABET* and decide the issue in an appropriate future case. *See* https://apps.nlrb.gov/link/document.aspx/09031d4583517792.

13 No. 1:21-cv-11773, 2021 WL 2948052, at *4–*5 (D.N.J. July 14, 2021).

14 *Collins v. Yellen*, 141 S. Ct. 1761 (June 23, 2021).

15 *Id*. at 1783 (stating presumption that "the President holds the power to remove at will executive officers and that a statute must contain 'plain language to take [that power] away'" (quoting *Shurtleff v. United States*, 189 U.S. 311, 316 (1903))).

members of the *Board* protection from removal except for "neglect of duty or malfeasance in office." Any claim that President Biden could not remove General Counsel Robb except for cause therefore also contradicts the long-settled presumption that "when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning."[16] It is equally well settled that a statutory term limit does not imply any limitation on the President's removal power.[17]

Respondent's Petition to revoke thus twists the caselaw when it states that "principal officers serving fixed terms at independent agencies are removable only for-cause." (Pet. 10). It's not simply that such a rule is not "bedrock" (*id.*); *no such rule exists*.[18] In fact, in one of the cases cited by Respondent for this supposed "rule," *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court did not find that the Securities and Exchange Commissioners had tenure protections at all—it merely assumed for purposes of argument that they did because both parties had litigated the case on the same assumption.[19]

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16 *Id*. at 1782 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)) (decision by Congress to include removal restrictions in one section of statute and omit them in another creates presumption that such restrictions are limited to their express terms); *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (cleaned up). The Court in *Collins* concluded that Congress placed no restriction on the President's power to remove the Acting Director of the Federal Housing Finance Agency ("FHFA") because "[i]n the Recovery Act, Congress expressly restricted the President's power to remove a confirmed Director but said nothing of the kind with respect to an Acting Director." *Collins*, 141 S. Ct. at 1782.

17 *Parsons v. United States*, 167 U.S. 324, 342 (1897).

18 In fact, the sole case where the Supreme Court has *ever* implied a restriction on the removal of a principal officer into a statute that did not expressly contain one is *Wiener v. United States*, 357 U.S. 349 (1958). That case turned on the rationale that the body in question was a purely adjudicatory body with a unique need for "absolute freedom from Executive interference." *Id.* at 353-56. The Counsel is a prosecutor, not an adjudicator, "so *Shurtleff*, not *Wiener*, is the more applicable precedent." *Collins*, 141 S. Ct. at 1783 n.18; see above n. 7.

19 561 U.S. 477, 487 (2010).

And any construction of the Act that would limit the President's power to remove the General Counsel would raise serious questions about whether such a construction would be constitutional.[20] If there were any ambiguity, the Board would have to construe the Act to avoid any such questions.[21] And given that such a construction is not only readily available here, but also the best reading of the statute, the Board should find that the statute does not provide removal protection for the General Counsel.

As shown above, the Supreme Court's recent decision in *Collins* effectively rejects, and the district court's subsequent decision in *Amerinox* directly rejects, any argument that the General Counsel is not removable at the pleasure of the President. Accordingly, former General Counsel Robb was lawfully removed.[22]

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[20] *Collins*, 141 S. Ct. at 1787 (unconstitutional to insulate head of FHFA from removal at the President's pleasure); *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199–00 (2020) (unconstitutional to insulate Director of the Consumer Financial Protection Bureau from removal at the President's pleasure).

[21] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987); *see also, e.g.*, *Operating Engineers Local 150 (Lippert Components, Inc.)*, 371 NLRB No. 8, slip op. at 2 (July 21, 2021) (Chairman McFerran, concurring) (applying constitutional avoidance doctrine); *id.* at 5 (Members Kaplan and Ring, concurring) (same, with an extended discussion of *DeBartolo Corp.*).

[22] Given that Respondent's arguments about the incumbent General Counsel's validity are (a) not properly before the Board, and (b) frivolous on their merits, it is not necessary or appropriate to pass upon the remedy they seek.

We note, however, that *what Respondent* seeks—in essence, asking for the Senate's confirmation of an officer of the United States to be declared invalid and for adjudicators to refuse to treat that officer as legitimate—is without precedent in American law. *Cf. NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 944 (2017) (invalidating period of service of non-Senate-confirmed Acting Counsel for failure to comply with terms of Federal Vacancies Reform Act); *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (invalidating period of service of non-Senate-confirmed Board members for failure to comply with requirements of Recess Appointments Clause).

In short, Respondent has provided no grounds for the subpoena to be revoked. The Petition to revoke should be denied forthwith.

III. Respondent's Other General Objections to the Subpoena Are Without Merit

The Subpoena is not overly broad or unduly burdensome. Respondent first seeks (Pet. 11–12) to revoke the Subpoena as it seeks documents pertaining to facilities other than the New Brighton, Minnesota facility (the "New Brighton Facility"). To obviate the need for potentially voluminous document production, Counsel has offered Respondent stipulations that would render production unnecessary as to its nationwide application. Such stipulations would permit the parties to devote their energies to the legitimate disputes as to the facts and law involved. Counsel is encouraged by Respondent's initial communications regarding stipulations and we continue to discuss them with Respondent.

If Respondent continues to deny nationwide applicability of the policies as set forth in paragraph 4(b) of the Amended Complaint, Counsel submits, with the below-described offers to limit the scope of the Subpoena, that Respondent be ordered to produce responsive documents.

As a threshold matter, the Subpoenaed documents are all relevant to the allegations at issue in this matter and should be produced. As noted above, Counsel's broad authority compels Respondent to produce information "if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint."[23] Amended Complaint paragraph 4(b) alleges that Respondent unlawfully applied and/or directed its managers and/or supervisors, to unlawfully apply its dress code and/or apron policies (the "policies") to employees displaying "BLM" and/or "Black Lives Matter." The Amended Complaint, at paragraph 4(c), alleges Respondent unlawfully applied its policies to

[23] ALJ BENCH BOOK at § 8-310; *see also* NLRB RULES AND REGULATIONS, § 102.31(b).

Charging Party (b) (6), (b) (7)(C) for having displayed "BLM" on [redacted] apron. Contrary to Respondent's assertion in its Petition (Pet. 12), the Amended Complaint is not limited solely to the policies as applied to the New Brighton Facility and (b) (6), (b) (7)(C). Rather, many of Counsel's Subpoena requests go to Respondent's alleged unlawful application of the facially-neutral policies both at the New Brighton Facility *and* Respondent's other facilities throughout the United States.

Respondent further argues that if compelled to produce documents from facilities other than the New Brighton Facility, it should, at most, only be compelled to produce from the District in which the New Brighton Facility sits (Pet. 12), as that is where the alleged constructive discharge of (b) (6), (b) (7)(C) took place. This does not address the merits of the dispute. The Amended Complaint clearly alleges unlawful application at Respondent's facilities nationwide and seeks the *nationwide* remedy of recission of its unlawfully applied policies.[24] The requested documents are necessary to confirm that the policy has, in fact, been applied on a nationwide basis. And Counsel remains amenable to limiting production to for certain paragraphs (specified below) <u>*upon stipulation*</u> of nationwide application of the policies.

Respondent further objects to Counsel's definition of "facilities" as overly broad and vague (Pet. 13). There is nothing ambiguous on its face, however, about the term "facilities." Further, as explained to Respondent by phone, the term applies to all premises owned by Respondent. To the extent Respondent would stipulate that all or some of its facilities (e.g.,

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[24] Counsel is somewhat puzzled by Respondent's citation (Pet. 12) to *AT&T Mobility, LLC*, 370 NLRB No. 121 (May 3, 2021), as it does not appear to support its assertions. Counsel will, however, urge the Board to overturn *AT&T* and return to its prior approach of requiring rescission of rules that have been unlawfully applied to restrict Section 7 rights. *(AT&T Mobility, LLC.*, 370 NLRB No. 121, slip op. at 7 (May 3, 2021) (overruling prong three of *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004)).

stores, distribution centers, supply chain hubs, etc.) apply the policies, as alleged, in paragraph 4, Counsel is willing to limit its requests accordingly pursuant to mutually agreeable stipulations.

Respondent further argues that, due to its size, the burdens imposed on it to produce documents from facilities nationwide would "far exceed the evidentiary value to the Counsel." (Pet. 13). It is insufficient for a party, as Respondent has done, to merely level bare assertions of burdensomeness in the hopes of quashing a subpoena for documents.[25] Respondent has not provided details beyond the size of the company to argue for limiting the scope of production and therefore has failed to meet its burden. Further, such documents must be produced as they are relevant to Counsel's allegations.

IV. Respondent's Specific Objections to the Subpoena Are Without Merit

Respondent specifically objects to paragraphs 1–5, 7–9, and 13–16. Each objection is addressed below in the order presented in Respondent's Petition.

Subpoena Paragraph 1

- Documents reflecting all iterations of Respondent's dress code and/or apron policies.

Respondent objects to providing "documents reflecting all iterations of Respondent's dress code and/or apron policies" on two grounds (Pet. 14) in addition to the geographic scope objections discussed *supra*. First, Respondent argues "all iterations" is not specified. While we do not concede that the term "all iterations" requires clarification, Counsel will specify that "all iterations" applies to all dress code and/or apron policies *in effect* at its facilities in the United States.

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[25] *See NLRB v. AJD, Inc., a McDonald's Franchisee*, 2015 WL 7018351 (S.D.N.Y. Nov. 12, 2015) (whether a subpoena poses an undue burden "is typically a fact-intensive inquiry [requiring] a respondent to show that the actual costs of discovery are unreasonable in light of the particular size of the respondent's operations").

Respondent next objects to the period requested in Request 1 because it is not limited to (b) (6), (b) (7)(C)' tenure. (Pet. 14). The request is relevant to Amended Complaint paragraph 4, as it requests the policies in effect nationwide, not just those applicable to (b) (6), (b) (7)(C)

Respondent also objects to the geographic scope. For reasons stated above in Section III, responsive documents nationwide are relevant to Counsel's proving nationwide applicability as alleged in Amended Complaint paragraph 4(b).

For these reasons, documents responsive to Subpoena paragraph 1 should be produced.

Subpoena Paragraph 2

- Documents, including, but not limited to discipline(s) and counseling(s), as would show the Respondent's application of its dress code and/or apron policies related to "BLM" and/or "Black Lives Matter."

and

Subpoena Paragraph 5

- Documents reflecting guidance and/or application of Respondent's dress code and/or apron policies, practices, and/or the tolerance of the display of "BLM" and/or "Black Lives Matter."

Respondent objects to providing documents, including disciplines and counselings (paragraph 2) and guidance and/or application (paragraph 5), related to "Black Lives Matter" and/or "BLM" and the policies because they are overly broad and unduly burdensome. (Pet. 14). Respondent states, without details, that searching electronically stored information would be costly. Such a bald assertion of costliness is an insufficient basis quash requests for such relevant information.[26]

The Amended Complaint (paragraph 4(b)) alleges Respondent applied the policies to employees displaying "Black Lives Matter" and/or "BLM." To the extent Respondent maintains

[26] *See above, McDonald's Franchisee,* 2015 WL 7018351 at 5.

its partial denial to paragraph 4, Counsel will need to establish the allegation on the record and the documents set forth in Subpoena paragraph 2 are clearly relevant. As noted above, Counsel would be willing to enter a stipulation that these policies were applied and/or applicable nationwide to employees displaying such terms. If Respondent agrees to such a stipulation, Counsel will withdraw Subpoena paragraph 2 and limit Subpoena paragraph 5 to the District in which the New Brighton Facility sits, as the produced documents would remain relevant to the constructive discharge allegations in the Amended Complaint.

Respondent also objects to these paragraphs based on the time limitation as beyond (b) (6), (b) (6), (b) (7)(C) tenure. If Respondent stipulates as discussed above, Counsel will withdraw paragraph 2. The documents requested in paragraph 5 are clearly relevant to the constructive discharge allegation and should be produced as, among other things, they may provide background to actions taken by Respondent toward (b) (6), (b) (7)(C) as well as to whether Respondent's conduct was motivated by animus.[27]

Subpoena Paragraph 3

- Documents, including, but not limited to, discipline(s) and counseling(s), associated with dress code and/or apron policies from Respondent's facilities included in (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (known to Counsel for General Counsel as District 103).

Respondent objects to Counsel's Subpoena paragraph 3 which seeks documents, such as disciplines and counselings, associated with Respondent's policies within the District in which the New Brighton Facility sits as overly broad and unduly burdensome. (Pet. 15) Counsel will seek to establish at trial that certain District managers were involved in the alleged constructive discharge of (b) (6), (b) (7)(C) Therefore, evidence of how similarly situated employees were treated at

[27] ALJ BENCH BOOK § 16-402.2 (Mar. 2021), and authorities cited therein.

facilities under the same District managers' charge would be relevant to Counsel's constructive discharge allegation.

Respondent also raises the issue of cost of production. For the same reasons as discussed above, the bare assertion of cost is insufficient to outweigh the relevance of the requested information. To address Respondent's concern and narrow the "including, but not limited to" language, Counsel is willing to limit this request to "documents, including disciplines, counselings, emails, communications, and/or file notations related to employee violations and/or potential violations of its policies from Respondent's facilities included in (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (known to Counsel for Counsel as District 103)." Here, the requested documents specifically relate to the application or nonapplication of Respondent's policies and are therefore relevant to the alleged constructive discharge of (b) (6), (b) (7)(C) involving those same policies. Such documents should be produced.

For the same reasons as discussed above, Respondent's objection to the time period for production should be dismissed. Such documents, as further limited by this section, are relevant to the allegation of (b) (6), (b) (7)(C) constructive discharge.

Subpoena Paragraph 4

- Documents reflecting discussions and/or directives regarding "BLM" and/or "Black Lives Matter" related to Respondent's dress code and/or apron policies from January 1, 2019 to present.

Respondent objects to providing discussions and/or directives regarding "BLM" and/or "Black Lives Matter" because it is overly broad and unduly burdensome as it seeks documents from outside (b) (6), (b) (7)(C)' tenure. (Pet. 16). As described above, this case is not only about (b) (6), (b) (7)(C) alleged constructive discharge. Rather, Counsel more broadly alleges unlawful

application nationwide. Thus, (b) (6), (b) (7)(C) tenure is not a relevant period for limitation and this objection should be dismissed.

Subpoena Paragraph 7

- Communications referencing (b) (6), (b) (7)(C) and: race, racial harassment, harassment, "BLM" and/or "Black Lives Matter."

and

Subpoena Paragraph 8

- Documents related to complaints and investigations of racial harassment allegations made at the New Brighton Facility from (b) (6), (b) (7)(C) to present.

For the reasons discussed above in Section III, Respondent's objection to Subpoena paragraphs 7[28] and 8 related to time period should be dismissed and documents should be produced. (Pet. 17).

Subpoena Paragraph 9

- The personnel file of Respondent employee (b) (6), (b) (7)(C).

Respondent objects to providing certain documents within employee (b) (6), (b) (7)(C) personnel file. (Pet. 18). As noted in Counsel's definitions and instructions attached to the Subpoena, we are not seeking "medical records and is not intended to include other documents protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)." Counsel also does not seek "routine non-disciplinary employment documentation" as Respondent phrases it in its Petition. However, Counsel does seek documents referring to harassment and/or investigation(s) into harassment levied against (b) (6), (b) (7)(C) and/or levied by (b) (6), (b) (7)(C) contained in (b) (6), (b) (7)(C) personnel file.

[28] Respondent refers to Subpoena paragraph 4 in Section III.f of its Petition to Revoke. Counsel assumes Respondent intended to refer to Subpoena paragraph 7.

Subpoena Paragraph 13

- Documents, including emails and other communications related to text messages, emails, and/or conversations between (b) (6), (b) (7)(C) and Respondent's agents, managers, and/or supervisors, referencing racial harassment, harassment, "BLM," "Black Lives Matter," and/or Black History Month.

Respondent objects to the time period for documents sought by paragraph 13. (Pet. 18). Documents responsive to this request and created after [redacted] tenure are relevant to the constructive discharge allegation. Therefore, Counsel is willing to limit its request in Paragraph 13 to the beginning of (b) (6), (b) (7)(C)' employment at the New Brighton Facility to present.

Respondent further objects to the geographic scope of this request. However, to the extent there are responsive documents in Respondent's possession, custody, or control, such documents are clearly relevant and should be produced.

Subpoena Paragraph 14

- Copies of all notes, photographs, or videos taken or made by any supervisor or agent of Respondent concerning any discussions, meetings, or other protected concerted activities, including, but not limited to, discussions of racial harassment, of Respondent's flooring department employees at the New Brighton Facility during the period from August 1, 2020, to present.

For the reasons discussed above in Section III, Respondent's objection to Subpoena paragraph 14 related to time period should be dismissed and documents should be produced. Regarding Respondent's contention that Subpoena paragraph 14 is overly broad and irrelevant as it relates to "other protected concerted activities," (Pet. 19) Counsel will limit this request to "copies of all notes, photographs, and/or videos taken and/or made by any supervisor or agent of Respondent concerning any discussions and/or meetings among and/or including associates in the flooring department regarding 'BLM,' 'Black Lives Matter,' Black History Month, race,

and/or racial harassment, of Respondent's flooring department employees and/or customers at the New Brighton Facility during the period from August 1, 2020 to present."

Subpoena Paragraph 15

- Communications, including, but not limited to, posters, emails, and/or memoranda, displayed, issued, and/or presented to associates by Respondent, which referenced, were in support of, and/or coincided with Respondent's acknowledgement and/or celebration of Black History Month and/or racial equality.

For the reasons discussed above in Section III, Respondent's objection (Pet. 19) to Subpoena paragraph 15 related to time period should be dismissed and documents should be produced. To the extent Respondent stipulates to nationwide applicability as described above in Section III, Counsel would limit its request in Paragraph 15 to the New Brighton Facility for the period set forth in the Subpoena.

Subpoena Paragraph 16

- Communications issued by/or on behalf of Respondent's chief executive officer, human resources department, Regional managers, and/or District managers, concerning, reflecting, and/or defining, Respondent's corporate philosophy as it applies to race and/or racial harassment in the workplace.

Respondent objects to Subpoena paragraph 16 due to irrelevance, overbreadth, burdensomeness, as well as to geographic scope. (Pet. 20). The purpose of this request is to obtain documents setting forth Respondent's corporate philosophy as it relates to race and/or racial harassment in the workplace. As will be shown at trial, Respondent has itself inserted such topics into the workplace by, among other things, messages from the chief executive officer who wrote in part:

> Over our company's history, we have built an environment where we take care of each other, build strong relationships and value respect for all people. As I did in my note on Saturday, I want to thank our 400,000-plus associates for helping to uphold our values. Diversity and respect for all people are core to who we are as

> an Orange-Blooded family. We do not support discrimination in any form, period.[29]

Counsel believes other communications from, or on behalf of, the CEO, executive vice president of human resources, and/or the human resources department would similarly be relevant to whether "BLM" and/or "Black Lives Matter" address workplace matters. Counsel is, however, willing to limit production pursuant to Subpoena paragraph 16 to the CEO, executive vice president of human resources, and/or the human resources department.

Dated at Minneapolis, Minnesota on September 20, 2021.

/s/ David J. Stolzberg

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[29] A Message From our CEO, *MESSAGE FROM CRAIG MENEAR – RACIAL EQUALITY & JUSTICE FOR ALL*, https://corporate.homedepot.com/newsroom/message-craig-menear-%E2%80%93-racial-equality-justice-all (Last Visited Sept 19, 2021).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

HOME DEPOT U.S.A., INC
(Respondent)

and **Case 18-CA-273796**

(b) (6), (b) (7)(C)
(An Individual)

CERTIFICATION OF SERVICE OF: General Counsel's Opposition to Respondent's Petition to Revoke Subpoena Duces Tecum and Certification of Service.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 20, 2021 I served the above-entitled document(s) by electronic service, as noted below, upon the following persons, addressed to them at the following addresses:

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(b) (6), (b) (7)(C)

Email: (b) (6), (b) (7)(C)

Date: September 20, 2021

/s/ David J. Stolzberg
(Signature)

David J. Stolzberg
(Name)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

HOME DEPOT USA, INC., Respondent, v. (b) (6), (b) (7)(C), An Individual.	NLRB Cases 18-CA-273796

HOME DEPOT U.S.A., INC.'S RESPONSE TO THE GENERAL COUNSEL'S OPPOSITION TO THE PETITION TO REVOKE

Pursuant to Section 102.31(b) of the National Labor Relations Board's Rules and Regulations, Home Depot U.S.A., Inc., ("Home Depot") submits this response to the General Counsel's Opposition to Respondent's Petition to Revoke Subpoena Duces Tecum.

The General Counsel's response fails to engage with the substance of Home Depot's First Amendment challenge. The General Counsel does not—and cannot—deny that the core purpose of this proceeding is to force Home Depot to communicate specific political or social messages on Home Depot aprons worn by customer-facing employees, even though Home Depot has made a clear choice *not* to communicate those messages in that forum. That effort flies in the face of decades of Supreme Court precedent barring the government from compelling speech. The General Counsel dismisses that precedent because it arose outside the labor context and is supposedly trumped by the Supreme Court's earlier decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). That is mistaken. The Supreme Court has made crystal clear that its compelled-speech doctrine fully applies in labor cases. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018). And *Gissel* rejected First Amendment protection for employer

speech designed to threaten employees to dissuade them from unionizing. Nothing remotely close to that is at issue here, where Home Depot merely seeks to apply its neutral policy against using its aprons to display any kind of political or social messages unrelated to workplace matters.

The General Counsel ultimately wants the Administrative Law Judge ("ALJ") to ignore the Constitution and rubber stamp its request for extensive and intrusive discovery into Home Depot's policies governing the speech it communicates on its aprons. That is not how this proceeding works. The ALJ has an independent obligation to apply all federal law—including the First Amendment—to protect Home Depot from the General Counsel's overreach. Here, that means revoking the subpoena.

Given the importance of the constitutional issues, Home Depot respectfully requests an opportunity to present oral argument in support of its petition. And, in the event the petition is denied, Home Depot requests that the forthcoming November 2, 2021 hearing date be stayed so that the Board can seek judicial enforcement of the subpoena under 29 U.S.C. § 161(2).

I. The Subpoena Should Be Revoked Because The End Goal of This Action Would Violate Home Depot's First Amendment Rights

A subpoena should be revoked when it has not been issued pursuant to the Board's "lawful authority," which requires that the subpoena be based on a "lawful purpose" and a "legally sufficient" charge of misconduct. *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 817 (8th Cir. 2012); *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017). Here, the Complaint seeks to force Home Depot to display specific political or social messages (in this case, about Black Lives Matter ("BLM")) on the iconic orange aprons worn by its customer-facing employees. That result cannot be squared with the First Amendment, which—as the Supreme Court has repeatedly held—prohibits the government from both (1) "telling people what they must say," and (2) "forc[ing] one speaker to host or accommodate another speaker's

message." *Rumsfeld v. F. for Acad. & Inst. Rts, Inc.* ("*FAIR*"), 547 U.S. 47, 61, 63 (2006); *see also* Pet. 5-6 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986); *Wooley v. Maynard*, 430 U.S. 1428 (1977); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)). The Board's subpoena was issued in service of an unconstitutional Complaint, and it must therefore be revoked.

The General Counsel's opposition fails to meaningfully engage with any of Home Depot's arguments. First, the General Counsel does not deny Home Depot's core point that any message conveyed on the aprons worn by Home Depot employees, serving Home Depot customers, on Home Depot property, constitutes *Home Depot's* speech. At one point, the General Counsel implies in passing (at 5) that a BLM message worn on a Home Depot apron might constitute the employee's speech. That is not correct: "When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson." *Janus*, 138 S. Ct. at 2474. But even if the speech were attributable to the employee, forcing Home Depot to serve as the conduit for that speech would still be unconstitutional. Pet. 8-9.[1]

Nor does the General Counsel grapple with any of the Supreme Court's compelled-speech cases or explain why those cases would allow the Board to force Home Depot to convey specific

[1] To the extent the General Counsel suggests (at 5) that the First Amendment bars Home Depot from restricting employee speech, it is also mistaken. Home Depot is "a private entity, not a governmental entity, and thus is legally incapable of violating anyone's First Amendment rights." *Manson v. Little Rock Newspapers, Inc.*, 200 F.3d 1172, 1173 (8th Cir. 2000); *see generally, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926, 1930 (2019); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Dossett v. First State Bank*, 399 F.3d 940, 954 (8th Cir. 2005).

political or social messages that Home Depot wishes not to communicate. Indeed, the opposition does not mention a single Supreme Court case addressing the First Amendment from the last half century, let alone one addressing compelled speech.

What little response the General Counsel does offer misstates the law. In a grand total of two sentences (at 4), the General Counsel casually dismisses the Supreme Court's compelled-speech cases as irrelevant to the labor context, waving aside decades of authority as "First Amendment caselaw from various other, non-labor contexts" that "does not address the 'context of the labor relations setting.'" But there is no categorical labor law exception to the Court's First Amendment doctrine. On the contrary, the Supreme Court's recent decision in *Janus* applied the exact same line of compelled-speech cases that Home Depot invokes here to invalidate a state law requiring non-member public employees to pay agency fees to public-sector unions. 138 S. Ct. at 2463-65 (citing *Wooley*, *Riley*, *Tornillo*, *Pacific Gas*, and *Barnette*). And other courts have likewise applied the Court's compelled-speech cases to invalidate Board decisions compelling employer speech under the guise of the NLRA.[2] The General Counsel is wrong to assert that the Supreme Court's canonical compelled-speech cases are somehow irrelevant to the labor context.[3]

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[2] *See, e.g.*, *Nat'l Ass'n of Mfrs. v. NLRB* ("*NAM*"), 717 F.3d 947, 956-60 & n.13 (D.C. Cir. 2013) (citing *Pacific Gas*, *FAIR*, *Riley*, *Wooley*, *Barnette*, *Tornillo*, and *Hurley*), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Ag.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc); *Sysco Grand Rapids, LLC v. NLRB*, 825 F. App'x. 348, 359-60 (6th Cir. 2020) (citing *FAIR*).

[3] The General Counsel's narrow view of the First Amendment contradicts the approach it took in *NAM*. There, an industry group challenged an NLRB rule requiring employers to post, on their property and websites, a government-drafted notice explaining employees' rights under the NLRA. 717 F.3d at 949. The group argued that the rule violated the First Amendment by compelling employers' speech in a manner forbidden by *Riley*, *Pacific Gas*, and *Wooley*. Notably, the General Counsel's brief to the D.C. Circuit did *not* respond as the General Counsel does here—by categorically denying that the Supreme Court's compelled-speech cases have any application to the NLRA or to the labor context more generally. Instead, the General Counsel *distinguished* the Supreme Court cases by emphasizing what it believed to be a "critical" point—that whereas the

The General Counsel also asserts (at 2-3) that "[d]ecades" of "well-established" Supreme Court and Board precedent address the interplay of the NLRA and the First Amendment and support her argument that compelling Home Depot's speech is constitutional. But the only authority she discusses in any detail is *NLRB v. Gissel Packing Co.* There, the Board brought an action against an employer that had responded to a union-organizing drive by making threatening statements to employees about its "precarious financial position" and the "great difficulty" they would face "finding employment elsewhere" once a "probable . . . plant shutdown" resulted from union strikes. 395 U.S. at 619. The Supreme Court acknowledged that employer speech is generally protected by the First Amendment. *Id.* at 617. Nonetheless, it rejected the employer's First Amendment challenge in the circumstances at issue, holding that the employer's statements were "a threat of retaliation based on misrepresentation and coercion" meant to dissuade the organizing effort "and as such without the protection of the First Amendment." *Id.* at 618.

Gissel has nothing to do with this case, which does not involve the suppression of employer speech threatening employees with harmful consequences for participating in union organizing. Far from it: This case involves the General Counsel's effort to force Home Depot to communicate, on its employee aprons, ideological speech conveying political and social messages unrelated to workplace—types of speech that Home Depot does not wish to communicate in that forum. Home

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NLRB rule being challenged merely required employers to post a "non-ideological" notice informing employees of their legal rights, the Supreme Court's compelled-speech cases involved efforts to force private parties to disseminate an "*ideological point of view*." NLRB Br. *66, *Nat'l Ass'n of Mfrs. v. NLRB*, Nos. 12-5068 & 12-5138, 2012 WL 3152145 (D.C. Cir. Aug. 3, 2012) (emphasis added) (citation omitted). Here, of course, the pro-BLM speech at issue is ideological. It therefore falls squarely within what even the General Counsel's *NAM* brief acknowledged as the heartland of the relevant Supreme Court precedent. The General Counsel's view in this case—that compelling ideological speech is consistent with the First Amendment, so long as it occurs in the labor context—is not only extreme, but departs from her predecessor's more candid approach in *NAM*.

Depot's longstanding and evenhanded policy of prohibiting display of "causes or political messages unrelated to workplace matters" (Pet. Ex. 1, at 2) on employees' aprons is not remotely comparable to the "threat of retaliation based on misrepresentation and coercion" at issue in *Gissel*.

The General Counsel is also wrong to suggest that *Gissel* more generally subordinates an employer's First Amendment rights to the NLRA. The Supreme Court has interpreted *Gissel* to stand for the more limited proposition that the NLRA, consistent with the First Amendment, may *prohibit* an employer from making affirmative coercive threats against its employees. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Nike, Inc. v. Kasky*, 539 U.S. 654, 680-81 (2003) (Breyer, J., dissenting). *Gissel* does not speak to whether the Board is justified in *compelling* an employer either to voice a specific message or to accommodate the speech of third parties. And although *Gissel* notes that courts must take account of the "labor relations setting" when assessing the scope of an employer's First Amendment rights, 395 U.S. at 617, that is fully consistent with Home Depot's position here. Nothing about the "labor relations setting" makes it constitutional for the Board to force Home Depot to display ideological messages on its aprons.[4]

The General Counsel's other cited cases are even less instructive on the First Amendment issues, for a simple reason: *None of them actually involved the First Amendment*. Neither *Republic*

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[4] The General Counsel's discussion of *Gissel* (at 2) also highlights Section 8(c) of the NLRA, which states that an employer's expression "of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice"—unless the expression contains an employer's "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). That provision affirmatively *supports* Home Depot: It reflects the First Amendment principle, reaffirmed in *Gissel*, that employer speech is fully protected—and cannot be punished—except when it leverages the employer's inherent power to threaten employees. *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 66-69 (2008) (describing history and purpose of Section 8(c)). Section 8(c) fully protects Home Depot from NLRA liability here, because Home Depot's decision not to convey certain messages on company-owned aprons is neither coercive nor threatening. *See NAM*, 717 F.3d at 954-60 (applying Section 8(c) to forbid compelled speech).

Aviation Corp. v. NLRB, 324 U.S. 793 (1945), nor *American Medical Response West*, 370 NLRB No. 58 (Dec. 10, 2020), nor *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (Mar. 21, 2017), discussed—or even mentioned—the First Amendment. It is true that each case involved the Board "regulat[ing] an employer's ability to restrict employee expression" under Section 7 of the NLRA (at 3), but the employers in those cases did not invoke the First Amendment as a defense to the Board. So the General Counsel's assertion (at 2) of "Decades of Supreme Court and Board Precedent" purportedly rejecting Home Depot's challenge really amounts to nothing more than a misplaced reliance on *Gissel*.

Any doubt about whether binding precedent forecloses Home Depot's First Amendment argument is readily dispelled by the Board's own statements to the Supreme Court when opposing the employer's petition for certiorari in *In-N-Out Burger*. There, the employer sought to restrict employees from wearing buttons supporting wage increases on their workplace uniforms. The employer did not assert the First Amendment as a defense before the Board or on appeal to the Fifth Circuit. Instead, the employer raised a First Amendment compelled-speech defense—for the first time—in its petition for certiorari, relying on the Supreme Court's then-recent *Janus* decision.

The General Counsel's response (on behalf of the Board) was telling. Notably, the General Counsel did not actually defend the Board's ruling as consistent with the First Amendment. Nor did the General Counsel claim—as his successor does here—that the employer's compelled-speech argument was barred by decades of precedent (or even by *Gissel*). On the contrary, the General Counsel described the employer's First Amendments arguments as "novel" and urged the Supreme Court to deny review for that reason:

> Not only was [the employer's] compelled-speech claim not considered by the Board or the court of appeals in this case, *such a claim has not been considered by the Board or a court in the context*

> *of workplace insignia in <u>any</u> case*. . . . Further percolation on this issue is plainly warranted.

NLRB Br. 9, *In-N-Out Burger, Inc. v. NLRB*, No. 18-340 (U.S. Jan. 24, 2019), *cert. denied*, 139 S. Ct. 1259 (2019) (emphasis added). The General Counsel's argument to the Supreme Court—emphasizing the *absence* of precedent—contradicts the precedent-based assertions being made here.

Finally, the General Counsel falls back on the argument (at 4) that regardless of whether Home Depot is right about the First Amendment, its constitutional objection cannot be litigated in the context of a petition to revoke a subpoena. That point also fails. As Home Depot noted in its petition (at 4, 9-10), the subpoena is only proper if it was issued for a "lawful purpose" and based on a legally valid theory of alleged misconduct. *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 862-63 (D. Minn. 2010). In other words, the validity of the subpoena depends on the lawfulness of the underlying Complaint. That kind of "pure question of law" is not just amenable to resolution at this stage of the proceedings, it *must* be decided at this stage. *McLane*, 137 S. Ct. at 1168 n.3. As the Supreme Court has indicated, the determination "[w]hether a charge is 'valid'"—that is, whether the charge is "*legally sufficient*"—is by its nature "embedded" in the decision to revoke a subpoena. *Id.* (emphasis added) (citation omitted).

The General Counsel ignores *McLane* and the other cases establishing that a subpoena cannot be enforced when it rests on a legally invalid complaint. Moreover, her assertion (at 4) that Home Depot's First Amendment argument cannot be decided as a matter of law—and "can only be analyzed *after* the parties have presented their evidence and arguments in this case"—is mistaken. The General Counsel has not identified a single fact that would make a difference for resolving Home Depot's First Amendment argument. And the string of cases she cites (at 4 n.6) are inapposite because they involved respondents who sought to challenge a subpoena on grounds

that were intertwined with underlying disputed factual issues. By contrast, Home Depot's First Amendment argument here is purely legal and does not turn on any disputed question of fact. It can and should be addressed now.

II. The Complaint and Subpoena Are Ultra Vires

The General Counsel, as a term-limited principal officer of an independent agency, is subject to removal by the President before the end of his or her four-year term only for cause. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). The subpoena should also be revoked because General Counsel Jennifer Abruzzo was improperly appointed, and each of her actions has been ultra vires.

In response, the General Counsel argues (at 6) that (1) the subpoena was issued under the Board's authority, not General Counsel Abruzzo's; and (2) Home Depot's ultra vires argument is a merits defense that has no bearing on the validity or enforceability of a subpoena. As to the first point, there can be no dispute that the original and amended complaints in this action were filed under General Counsel Abruzzo's purported authority. Because both of these officials were improperly appointed, the Complaint is ultra vires, and any subpoena in service of that Complaint has not been issued pursuant to the Board's "lawful authority" and for a "lawful purpose." *Fortune Bay Resort Casino*, 688 F. Supp. 2d at 862-63. The General Counsel's second point goes directly to the legal validity of the Complaint and thus can appropriately be resolved now. *See McLane*, 137 S. Ct. at 1168 n.3; *supra* at 8-9.

Nonetheless, Home Depot acknowledges that the Board has determined that the ultra vires issue must be adjudicated by federal courts in the first instance. *See Nat'l Ass'n of Broad. Emps.*

& Techs., 370 NLRB No. 114, at *2 (Apr. 30, 2021); *see also* Pet. 11. Home Depot raises this argument here simply to preserve it, as needed, for any subsequent judicial review.[5]

III. If The ALJ Denies Home Depot's Petition, It Should Stay The Hearing Date So That The General Counsel Can Petition To Enforce The Subpoena In Federal District Court

In the event the ALJ denies Home Depot's request to revoke the subpoena, Home Depot respectfully requests a stay of the November 2, 2021, hearing date to allow the General Counsel to seek judicial enforcement of the subpoena pursuant to 29 U.S.C. § 161(2). Requiring such judicial enforcement is appropriate for two reasons.

First, Home Depot's First Amendment arguments are substantial and should ultimately be adjudicated, if necessary, by a federal district court. That is consistent with the statutory scheme in which "Congress has made elaborate provisions for obtaining and enforcing (NLRB) subpoenas." *NLRB v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110, 1116 (9th Cir. 1981) (alteration in original) (citation omitted). That scheme authorizes the Board to issue subpoenas as an initial matter, 29 U.S.C. § 161(1), but it also provides for district court enforcement in the event of noncompliance, *id.* § 161(2). The natural inference from Congress's "elaborate provisions" is that "(i)t was obviously [Congress's] intention that this machinery be utilized." *Int'l Medication Sys.*, 640 F.2d at 1116 (first alteration in original) (citation omitted).

This is no run-of-the-mill dispute about the relevance, burdensomeness, or overbreadth of a Board subpoena. *Cf.* ALJ BENCH BOOK § 8-300 (2021). Instead, Home Depot raises bedrock legal questions about the Board's overarching (and overreaching) theory of this case. In that

[5] Home Depot rests on its petition for the arguments that the subpoena should be modified because it is overbroad and unduly burdensome. *See* Pet. 10-21. As the General Counsel has indicated (at 1, 10-12), the parties are still engaging in good-faith negotiations over the scope of the subpoena and potential factual stipulations.

circumstance, the ALJ should "not infer that Congress intended to authorize [the Board] to bypass district court enforcement proceedings" when "[a]n efficient and fair enforcement mechanism has been provided and was meant to be used." *Int'l Medication Sys.*, 640 F.2d at 1116. Indeed, multiple courts of appeals have recognized that the Board must seek district court enforcement in similar circumstances, because discovery sanctions—if any—may only validly be imposed by an Article III court after judicial review of the dispute. *See id.*; *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 498-99 (4th Cir. 2011) (holding that only an Article III court can levy discovery sanctions for failure to comply with a subpoena on privilege grounds); *NLRB v. Detroit Newspapers*, 185 F.3d 602, 606 (6th Cir. 1999) (similar).

Second, the Board has conclusively determined that "[i]t is for *the courts* . . . to make the initial and final determinations" whether General Counsel Peter Robb was properly removed from office, and whether General Counsel Abruzzo was properly appointed. *Nat'l Ass'n of Broad. Emps. & Techs.*, 370 NLRB No. 114, at *2 (emphasis added). That ruling prohibits both the Board and any ALJ from adjudicating that issue. As a result, the only way for Home Depot to obtain a fair hearing on its ultra vires argument is for a federal court to consider it in the first instance.

Home Depot is aware that under Board precedent, the General Counsel is ordinarily not required to seek judicial enforcement of a subpoena, and instead may ask the presiding Administrative Law Judge to impose evidentiary sanctions on a party that fails to comply. *See, e.g.*, *McAllister Towing & Transp.*, 341 NLRB 394, 396-97 (2004); *but see Int'l Medication Sys.*, 640 F.2d at 1116; *Interbake Foods*, 637 F.3d at 498-99; *Detroit Newspapers*, 185 F.3d at 606. Such sanctions would be entirely inappropriate here, however, in light of the considerations identified above. Indeed, it would violate due process for sanctions to be imposed before Home Depot has an opportunity to have its arguments—and, in particular, its ultra vires challenge to the

subpoena based on General Counsel Robb's improper removal—fairly adjudicated by an impartial decisionmaker. Here, given the Board's ruling in *Broadcast Employees*, that impartial decisionmaker must be a federal court.

If the Court rules against Home Depot, it should accordingly stay the hearing so that the General Counsel can seek judicial enforcement of the subpoena.

CONCLUSION

For the reasons set forth here and in its petition, Home Depot respectfully requests that subpoena *duces tecum* B-1-1DL1GKT be revoked. If the Court denies the petition, it should stay the hearing date to allow the Board to seek judicial enforcement of the subpoena under 29 U.S.C. § 161(2). Home Depot also requests the opportunity to present oral argument in support of its petition.

Respectfully submitted,

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Dated: September 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2021 I filed the RESPONSE TO THE GENERAL COUNSEL'S OPPOSITION TO THE PETITION TO REVOKE via the National Labor Relations Board's E-File system, and served the same to the following parties via electronic mail:

(b) (6), (b) (7)(C) Charging Party
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